UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN J. CARONIA, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	)	DOCKET NUMBER DA-0752-96-0428-I-1 DATE: MAY 8, 1998

Gail M. Dickenson, Esquire, Dallas, Texas, for the appellant.

James P. Foley, Phoenix, Arizona, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The agency petitions for review of the initial decision, issued September 4, 1996, that did not sustain the agency's removal action. For the reasons set forth below, we GRANT the petition, AFFIRM the initial decision's finding that the appellant proved that discrimination on the basis of disability was a motive for the agency's action, VACATE the finding that it was the sole motive, and MITIGATE the penalty to a 30-day suspension.

BACKGROUND

The appellant was employed in the GS-11 position of Supervisory Security Officer. *See* Initial Appeal File (IAF), Tab 3, Subtab IVa, and Tabs 6, 13, 14. He consistently had received outstanding performance evaluations and had received a recommendation from program review for excellent work as a security officer. *Id*. In June 1995, he requested, and was granted, placement on leave for depression, diverticulosis, and severe gastrointestinal reflux disease. *Id*. The appellant was on leave from June 22, 1995, until November 20, 1995. *Id*. During that period, he told two coworkers who called to inquire about his health, that, because of the stress of dealing with his supervisor, before he went on leave, he had thoughts of killing his supervisor, which precipitated his seeking psychological help, and taking leave. *See* IAF, Tab 3, Subtab IV. After he returned from leave, the appellant told two other coworkers, who engaged him in conversation, that he had thoughts of killing his supervisor before he went on leave. *Id*.

One of the coworkers who phoned the appellant repeated what the appellant had said to an employee who was not a coworker of the appellant's at the time of the conversation, but who was detailed to work with the appellant's supervisor and a subordinate. *Id*. This employee, in turn, represented to the appellant's supervisor and subordinate that the appellant had threatened them. *Id*. The appellant's subordinate then informed agency officials of a conversation that he had with the appellant two years earlier in which the appellant stated that he had modified his van to carry a concealed weapon. *Id*. After receiving this information, the agency searched the appellant's car, and found in it a firearm and ammunition. *Id*. Later, the agency conducted an investigation of the statements that the appellant had made to coworkers. *Id*. The agency subsequently removed the appellant based on charges of bringing an unauthorized firearm and ammunition onto the grounds of a federal correctional facility, and conduct unbecoming a law enforcement officer, telling coworkers about his thoughts of harming his supervisor, his subordinate, and himself. *See* IAF, Tab 3, Subtabs IVb, IVe. The appellant petitioned for appeal, alleging that the agency's action was the result of

discrimination on the basis of disability (its perception that he was mentally disabled). *See* IAF, Tab 1.

During proceedings before the Board, the appellant stipulated to the facts underlying the charge of bringing an unauthorized firearm and ammunition onto the grounds of the correctional facility, but maintained that he had not intended to bring a weapon onto the grounds of the correctional facility, but that he had put the gun in his car before he took leave, and had forgotten it. *See* IAF, Tab 9. Before the Board, he repeated his statement, made in response to the notice of proposed removal, that he forgot that the gun was in his car when he drove to work and had not intended to bring a weapon onto the correctional facility. *Id*. The administrative judge found that, on December 1, 1995, the appellant had an unauthorized gun in his car when he drove onto the premises of the correctional facility. *See* IAF, Tab 16 (Initial Decision (ID) at 2). He found further that, even if the appellant had not intended to bring a weapon onto the correctional facility, as he alleged, he violated the agency's standards of conduct which prohibit even unintentionally bringing unauthorized weapons onto the facility. *Id*. (ID at 3). Thus, the administrative judge found that the agency proved charge one by preponderant evidence. *See* IAF, Tab 16 (ID at 2-3).

As to charge two, conduct unbecoming a law enforcement officer, the administrative judge found that, although the agency proved that the appellant engaged in the conversations charged, the conversations did not constitute conduct unbecoming for the following reasons: The appellant did not know, nor should he have known, that he should not have discussed his medical condition with interested coworkers who inquired about his health and with whom he shared an amicable relationship; the coworkers knew that the appellant was describing a past condition when he described his thoughts; and there was no evidence that the appellant intended to disturb the workplace through these

personal conversations. *See* IAF, Tab 16 (ID at 6-9). Thus, the administrative judge found that the agency did not prove charge two by preponderant evidence.[1] *Id.*

The administrative judge also found that the appellant proved his affirmative defense of disability discrimination. He found that the appellant showed that the agency perceived him as suffering from a mental impairment that foreclosed him from performing the duties of a Security Officer, and effected his removal primarily based on this perception. *Id.* (ID at 10). He found that despite the agency's perception, those responsible for the appellant's medical treatment believed that he posed no risk to his coworkers and could return to full duty at the facility without accommodation. *Id.* He found that the appellant's treating medical professionals believed that the appellant was not homicidal, and that he was not a threat to himself or others. *Id.* (ID at 11). He found that the agency did not establish a legitimate nondiscriminatory reason for its removal action. *Id.* Accordingly, the administrative judge reversed the agency's action, and ordered the agency to provide interim relief, if a petition for review were filed. *Id.* (ID at 12-13). The agency has now petitioned for review. *See* Petition for Review File (PfRF), Tab 1. The appellant has responded in opposition to the petition. *See* PfRF, Tab 3.

ANALYSIS

The Charges

In its petition, the agency argues that the administrative judge erred in finding charge two not sustained. The agency contends that the appellant's conduct was disruptive through negligence, and that it showed this through the testimony of the appellant's supervisor and subordinate as to the effect of the appellant's conduct on them. Citing *McCarty v. Department of the Navy*, 67 M.S.P.R. 177, 182 (1995), the agency

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[1] The agency did not charge the appellant with making a threat. The administrative judge properly therefore did not analyze the charge under Board case law applicable to threat charges. *See, e.g., Powell v. Department of Justice*, 73 M.S.P.R. 29 (1997).

contends that the administrative judge erred in finding that the appellant's conduct was not disruptive because it was unintentional.

As to this argument, the Board held in *McCarty*, 67 M.S.P.R. at 182, that intent is not an element of the charge of "Making Statements to Co-Workers that Resulted in Anxiety and Disruption in the Workplace." *McCarty*, however, is inapposite here. The agency charged the appellant only with "Conduct Unbecoming a Law Enforcement Officer," and the specifications supporting the charge recount only the appellant's statements to his coworkers. *See* IAF, Tab 3, Subtab IVe. Neither the charge nor the specifications supporting it state that the appellant's conduct resulted in anxiety or disruption. *See* IAF, Tab 3, Subtabs IVb, IVe. The agency may not bring additional reasons for its charge at the Board level after it effects an adverse action, because an appellant would have no opportunity to respond to such a charge. *See Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656, 664 (1994). Fundamental due process requires that the tenured public employee have "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

Even assuming that the appellant should have known based on all of the language of the notice of proposed removal that the agency was charging him with making statements that resulted in anxiety and disruption, the agency did not prove the charge. In *McCarty*, the appellant's statements did not cause anxiety or disruption to those who heard them; rather, they caused anxiety when they were repeated. *See McCarty*, 67 M.S.P.R. at 182. The Board held that under such circumstances, it is necessary to determine whether the anxiety and disruption was caused by the appellant's statements, or by the embellished retelling. *Id*.

Here, none of the appellant's coworkers who heard the appellant, first hand, explaining the thoughts that led him to seek help became anxious, or were disrupted. *See* IAF, Tab 3, Subtabs IVg, IVh, IVi, IVn; HT at 8-12. As noted above, one of these

coworkers mentioned the appellant's statement to an employee who did not speak with the appellant. *See* IAF, Tab IVl. That employee told the appellant's subordinate, who in turn told the appellant's supervisor. *See* Hearing Transcript (HT) at 15, 29. The evidence shows that the appellant's statement, which had been repeated to the employee, was repeated again to the appellant's supervisor and subordinate, who then became anxious from what they heard. *Id.*

Further, the record shows that the second retelling was an embellishment upon the statement that the appellant made. *See* IAF, Tab 3, Subtabs IVg, IVh, IVi, IVn; HT at 8-12. The coworkers to whom the appellant spoke consistently stated that the appellant's words indicated that his statements about thoughts that he would hurt or kill his supervisor were about thoughts that he had in the past, that he had sought help when the thoughts first occurred and was better, and that they did not take the appellant's words to be a threat against his supervisor, or to be serious. *Id*. Although the employee who repeated his hearsay knowledge of the appellant's statement to the appellant's subordinate did not testify, the appellant's subordinate testified that this employee cast the appellant's statement as a threat against the subordinate, and that the subordinate interpreted the appellant's statement as a threat. *See* HT at 15, 16. The appellant's supervisor also testified that he was told of the appellant's statements in such a way that he took them as a threat against him. *See* HT at 35. Thus, the agency has not established error in the administrative judge's finding that it did not prove that the appellant's words caused anxiety and disruption; rather the evidence of record shows that their embellished retelling, converting nonthreatening statements into threatening ones, caused the anxiety and disruption. *See McCarty*, 67 M.S.P.R. at 182. Therefore, the administrative judge properly did not sustain charge two.

The Disability Discrimination Allegation

In its petition for review, the agency contends that the appellant did not prove disability discrimination on the basis that he was perceived as disabled because he did not show that he was recovered. *See* PfRF, Tab 1 (Petition for Review at 6-7). An

appellant who raises a claim of disability discrimination may establish that he is disabled by showing that he is substantially limited in a major life activity, that he has a record of such a limitation, or that his employer regards him as having such a limitation in his ability to work, as when it views the employee's impairment as foreclosing generally the type of employment involved. *See* 29 C.F.R. § 1614.203(a)(1); *Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986); *Groshans v. Department of the Navy*, 67 M.S.P.R. 629, 639 (1995). The term "major life activity" means: "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working." 29 C.F.R. § 1614.203(a)(3).

Here, although the appellant continued to receive treatment for his depression, there is no evidence of record that his condition substantially limited a major life activity, including work. His impairments were of a temporary nature as shown by the expectation that he would make a full recovery, and the fact that he had been released to return to work by his treating physicians. *See* IAF, Tab 1; HT at 66. Such temporary impairments are not considered disabilities under the Rehabilitation Act. *See Carr v. Cohen*, Appeal No. 01942437, 1997 WL 291772 (EEOC May 22, 1997). Thus, there is no evidence that the appellant was actually disabled at the time of his removal.

Nonetheless, the evidence of record shows that the agency erroneously "regarded" the appellant as disabled since it relied on this impermissible motive, its perception that he had a condition that substantially limited the major life activity of working, when it proposed and effected his removal.[2] *See* IAF, Tab 3, Subtabs IVe, IVg, IVh, IVi, IVn.

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[2] The "regarded as" category covers individuals who are <u>not disabled</u> but who, because of attitudes or for any other reason, are regarded as disabled by others who have an effect on the individual securing, retaining, or advancing in employment. *Washington v. Brown*, EEOC Appeal No. 01953462, slip op. at 3-4 (Nov. 30, 1995); *see also Keown v. Crowell*, EEOC Appeal No. 01943171, slip op. at 5-6 (Aug. 24, 1995); *Yates v. U.S. Postal Service*, 70 M.S.P.R. 172, 179 (1996) (no accommodation was required where the appellant was merely regarded as disabled); *Groshans v. Department of the Navy*, 67

Even though the investigation into the appellant's statements showed that they were not as they had been characterized to the appellant's subordinate, the agency proposed to discipline the appellant for his remarks. *Id*. Additionally, the deciding official, who was aware of the appellant's treatment for depressive illness, *see* HT at 51, and that the appellant's treating professionals stated that the appellant was not homicidal, *see* IAF, Tab 3, Subtab IVc, and that the appellant acted appropriately under pressure in the past, *id*., testified that he remained "gravely concerned ... about what [the appellant] might do under future stressful circumstances, or even any other circumstances," HT at 45. He stated that the statements that the appellant made to his coworkers should have been made only in therapy with his counselor. HT at 50. Additionally, he testified that he believed the appellant's misconduct was in explaining his psychological condition to others, and the effect that telling that he had been in therapy might have on the workplace. HT at 52-53. The deciding official minimized the appellant's prior outstanding performance evaluations and recommendation from program review for excellent work as a security officer. *See* HT at 47-48. He also gave no consideration to the fact that the appellant acted appropriately after he had thoughts of harming his superior, by seeking treatment immediately. *See* IAF, Tab 14. Additionally, he gave no consideration to the fact that the appellant's depression was controlled and that he had been released to return to work by medical professionals, who expected his performance after his return to work to be at the same level as his past performance. *See* IAF, Tab 1 and Tab 3, Subtab IVd; HT at 59, 66. The deciding official testified that he viewed the appellant as not to be trusted around firearms "where the means and opportunity for homicides are immediately present." HT at 49. He also testified that he considered the appellant's potential for rehabilitation "to be nil." *See* HT at 50. He thus treated the appellant as foreclosed generally from performing the duties of a security officer. *See Forrisi*, 794 F.2d at 935.

M.S.P.R. 629, 639 (1995) (the "regarded as" category applies to individuals who "do not in fact have the condition which they are perceived as having").

The remarks, referenced above, indicating what entered into the decision-making process regarding the appellant, show that the removal decision was made in reliance on the impermissible motive of the appellant's perceived disability. The evidence of discrimination therefore is tied directly to the alleged discriminatory animus, the perception of the appellant as disabled by his depression and treatment, and constitutes direct evidence of disability discrimination. *See Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 122 (2d Cir. 1997); *Ostrowski v. Atlantic Mutual Insurance Cos.*, 968 F.2d 171, 181 (2d Cir. 1992). Where an appellant establishes direct evidence of discrimination on the basis of disability, to prevail, that is, to show that discrimination on the basis of disability was a motivating factor, he must also show that the agency's admittedly discriminatory action was prohibited, i.e., that he is a qualified disabled person against whom the agency may not discriminate. *See Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996); *Clark v. U.S. Postal Service*, 74 M.S.P.R. 552, 561 (1997).

A "qualified" disabled person is a disabled person who can perform the essential functions of his position, with or without reasonable accommodation, without endangering the health and/or safety of himself and/or others. 29 C.F.R. § 1614.203(a). The appellant showed that he was a qualified disabled person protected by the discrimination laws because, as discussed above with respect to the charges, the evidence showed that he was capable of performing his job duties without accommodation. Thus, in this case, the appellant established by direct evidence that his perceived disability was an impermissible "motivating factor" in the agency's removal action. The record shows, however, that another factor also motivated the agency's decision, specifically the sustained charge of bringing an unauthorized firearm onto the grounds of a correctional facility. Thus, the appellant's evidence of discrimination based on disability merely establishes that the agency had mixed-motives, both permissible and impermissible, for its decision. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 246 (1989).

Under the Rehabilitation Act, the remedies available to an employee who proves discrimination because of his disability are defined by Title VII of the Civil Rights Act of 1964. *See* 29 U.S.C. § 794a. Under Title VII, a federal employee is entitled to some relief if he proves that his disability was a "motivating factor" in the decision made, "even though other factors also motivated" the agency's decision. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-16; *Jones v. Department of the Army*, 68 M.S.P.R. 398, 406 (1995). In other words, a federal employee is entitled to some relief for discrimination on the basis of disability if he shows that the agency had "mixed-motives" for its action.[3]

The agency may limit the extent of the remedy available to the employee, however, if it proves that it would have made the same decision "in the absence of the impermissible motivating factor," i.e., discrimination on the basis of disability. 42 U.S.C. § 2000e-5(g)(2)(B). In that event, the appellant is not entitled to the remedies of reinstatement, back pay, or damages. *Id.*; *Buchanan v. City of San Antonio*, 85 F.3d 196, 200 (5th Cir. 1996); *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300 (8th Cir. 1995). *See also Jones v. Department of the Army*, 75 M.S.P.R. 115, 121-24 (1997) (applying the mixed-motive analysis in the context where a federal employee proved race discrimination was a motivating factor in the removal action for misconduct).

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[3] Section 2000e-2(m) was added to Title VII, effective November 21, 1991. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 107(a), 402(a), 1991 U.S.C.C.A.N. (105 Stat.) 1075, 1099. Section 2000e-2(m) amended Title VII to replace the "mixed-motive" framework for analyzing claims of discrimination based on direct evidence set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246 (1989), that is, that, even if an employee proves that membership in a protected category was a substantial factor in the decision to discipline, he is not entitled to any remedy if the employer proves that it had a legitimate motive for the action, that standing alone, would have induced it to make the same decision. *See Johnson v. Defense Logistics Agency*, 61 M.S.P.R. 601, 605 (1994). Section 2000e-2(m) modified the rule of *Price Waterhouse* to hold the employer "liable once the plaintiff shows that a protected characteristic played a motivating part in the employment decision." *See George v. U.S. Postal Service*, 74 M.S.P.R. 71, 79-80 (1997); *Beam v. Office of Personnel Management*, 66 M.S.P.R. 469, 475 n.1 (1995).

We must therefore decide whether the agency met its burden to prove by preponderant evidence that it would have taken the same action absent the impermissible motive. *See* 42 U.S.C. § 2000e-5(g)(2)(B); 1 Barbara Lindemann and Paul Grossmen, *Employment Discrimination Law* 41 (3d ed. 1996). In other words, the Board must decide whether the agency met its burden of persuasion to prove that it would have taken the same action based on the sustained charge, which we find was not tainted by the impermissible motive.

The deciding official testified that he viewed the appellant's misconduct of bringing an unauthorized weapon onto the grounds of the facility as "an extreme breach of institutional security." HT at 43. He testified that

> [e]ven though the parking lot [where the appellant parked the car in which the agency found the weapon] is not within ... the secure perimeter of the institution, we have minimum security camp inmates who would have access to the parking lot, and therefore it creates an unacceptable security hazard.

Id. He testified further that "even if one goes to a ... considerable degree to conceal the weapon, make it hard for anybody to find it, nonetheless it's a very serious violation, especially a knowing violation." *Id*. The deciding official testified further that he did not find credible the appellant's statement that he forgot that the weapon and ammunition were in his car. HT at 41. He testified that he believed that the appellant intended the firearms violation because he believed that the appellant lied to him by telling him that the appellant did not construct a hiding place for the gun in his car. HT at 42. Thus, the agency argues that it would have taken the removal action absent the impermissible motive based on both the seriousness of the sustained offense and whether the appellant committed a "knowing violation."

As noted above, the appellant maintained both before the agency and before the Board that he brought the weapon and ammunition onto the grounds of the facility inadvertently. *See* IAF, Tabs 3 and 6. The appellant provided an explanation for forgetting that the weapon and the ammunition found by the agency were in his car. He

testified that, in June 1995, before he took stress leave beginning on June 22, 1995, he put the gun and ammunition, for security, into the family car before an outing. *See* HT at 86-87. He testified further that he forgot that the gun and ammunition were in the car. *See* HT at 87. He attributed his forgetfulness to his illnesses, depression, diverticulosis, and severe gastrointestinal reflux disease, which, shortly after the appellant placed the gun in the car, became so severe that he had to take stress leave while he was undergoing treatment. *See* HT at 94; IAF, Tab 3, Subtab IVd. He indicated that, upon his return to work from stress leave, he and his wife usually drove her van to work, but they had begun driving the car where the gun was found a few days before the search because the car "had been sitting for so long and [the appellant] thought it would do some good to run [the car] and drive in to work." IAF, Tab 3, Subtab IVd.

The appellant also presented a plausible explanation for his statement that he did not construct a secret compartment as a hiding place for the gun that the agency found in his car. The appellant testified that he had constructed a compartment in which to hide valuables and a firearm in his van and that he had told his subordinate about this. *See* HT at 89. He testified also, however, that he had not constructed a hiding place in the car. *Id*. During the oral reply to the deciding official, he testified that he answered no to a question regarding whether he had constructed the hiding place for the gun that the agency found in his car. *Id*. He testified that his answer had been accepted without follow-up questions, and thus he had not been able to explain the distinction between the constructed hiding place in his van and the existing hiding place where he placed the gun in his car. HT at 89-90.

Intent is a state of mind which generally is proven by circumstantial evidence. *See Denney v. U.S. Postal Service*, 66 M.S.P.R. 191, 193 (1995). Where proof of intent must be derived from circumstantial evidence, all of the evidence regarding intent must be considered. *See Johnson v. Department of the Army*, 48 M.S.P.R. 54, 57 (1991), *aff'd*, 960 F.2d 156 (Fed. Cir. 1992) (Table). Plausible explanations are to be considered in

determining intent. *See Deskin v. U.S. Postal Service*, 76 M.S.P.R. 505, 510 (1997); *Kuykendall v. Department of Veterans Affairs*, 68 M.S.P.R. 314, 327 (1995).

As evidence of intent, the agency presented only the testimony of the deciding official that he did not believe the appellant's statement that he had forgotten that the gun and ammunition were in his car, and that the deciding official believed that the appellant lied when he stated that he did not construct the hiding place in his car where the agency found the gun. *See* HT at 41-43. The appellant's plausible explanations for why he had forgotten the gun and ammunition, and why he answered no to the deciding official's question regarding whether the appellant had constructed a hiding place for a gun in his car, outweigh the agency's evidence. Thus, we find that the agency failed to prove that the appellant's bringing an unauthorized firearm and ammunition onto the grounds of a federal correctional facility were knowing violations. Additionally, the agency searched the appellant's car based on its reaction to his statements to coworkers as colored by its perception of him as disabled. *See* IAF, Tab 3, Subtabs 4f, 4m; HT at 30. Further, the deciding official linked the appellant's past ideation of harming his supervisor and the fact that the unauthorized weapon was found in his car in reaching the decision to remove him, and in his belief that the appellant knowingly had the gun and ammunition in his car. *See* HT at 46-47. Thus, we find that the agency did not prove that it would have taken the same action, removal, based on the sustained charge in the absence of the impermissible motivating factor, discrimination on the basis of disability.

<u>The Board will determine a reasonable penalty for the appellant's sustained misconduct</u>.

As noted above, Title VII provides that, in a dual motive discrimination case, if an appellant establishes that an employment practice was motivated by impermissible and other factors, and an agency shows that it would have taken the same action in the absence of the impermissible factors, the appellant may not be awarded damages, reinstatement, or back pay. *See* 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). Here, we have found that an employment practice, removal, was motivated by both an

impermissible factor, disability discrimination, and another factor, the sustained misconduct of bringing an unauthorized firearm and ammunitions onto the agency premises, but that the agency did not prove that it would have taken the same action, removal, in the absence of the impermissible factor. We find, however, that although a finding that the agency would have taken the same action in the absence of the impermissible factor would have disallowed an award of damages, reinstatement, or back pay, the contrary finding does not require the opposite result. Rather, as explained more fully below, the contrary finding merely allows the award of damages, reinstatement, and back pay, if those remedies are appropriate under all of the circumstances of the case.

Such a reading of the statute is a plausible construction of its language, *see generally Miller v. Department of the Army*, 987 F.2d 1552, 1555 (Fed. Cir. 1993) (the starting point for statutory construction is the language of the statute itself). It also serves to assure that this provision of Title VII does not conflict with the Board's authority under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (CSRA), to determine whether, when not all of the charges are sustained, the penalty for the sustained charges is reasonable. *See White v. U.S. Postal Service*, 71 M.S.P.R. 521, 527-28 (1996); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981). It is well settled that the Board's statutory authority under the CSRA includes the authority to consider carefully whether the sustained charges merit the penalty imposed by the agency. *Douglas*, 5 M.S.P.R. at 308. *See generally* 2b Singer, *Sutherland Statutory Construction*, § 51.02 (5th ed.) (it is axiomatic that statutes should be construed to give effect to every provision, and must be construed to be in harmony, if possible). Further, such a reading of Title VII serves to assure that, where an appellant is guilty of misconduct, he will not avoid discipline because the agency has coupled a charge based on a permissible motive with one that may not be sustained because it has been tainted by an impermissible motive. Thus, we find that the appellant is not entitled to reinstatement and full back pay under the Rehabilitation Act, and we consider the appropriate penalty for the sustained offense under the CSRA.

We note that this rule is applicable only in cases of dual motivation, one permissible and the other impermissible. The rule is inapplicable in a case where an appellant proves that the agency's single motive for taking an adverse action was prohibited discrimination. *See Ellshoff v. Department of the Interior*, 76 M.S.P.R. 54, 79 (1997). Where an appellant proves that the agency's single motive for taking an adverse action was prohibited discrimination, that is, the action was based solely on an impermissible motive, the remedy for the discrimination is to make the appellant whole. *See Sublette v. Department of the Army*, 68 M.S.P.R. 82, 86 (1995). In a case where the Board finds that an impermissible motive, prohibited discrimination, was the sole motive for the agency's action, the Board will reverse the adverse action completely. *See Ellshoff*, 76 M.S.P.R. at 80.

The Board mitigates the penalty to a 30-day suspension.

When, as in this case, not all of the agency's charges are sustained, the Board independently and responsibly balances the *Douglas* factors to determine a reasonable penalty. *White*, 71 M.S.P.R. at 527. Here, the sustained charge is serious. Further, the appellant was on notice of the rule that he violated. As found above, however, the offense was not intentional. Additionally, the firearm found in the appellant's car was well concealed and was not within the secure perimeter of the prison. Further, the appellant had no prior disciplinary record, and his performance was above average. *See* HT at 47-48, 90. The agency's table of penalties prescribes a range of penalties for the sustained offense from official reprimand to removal for the first offense. *See* IAF, Tab 3, Subtab IVp. There is no evidence of record to show that there was any notoriety associated with the appellant's offense. Finally, the appellant's misconduct resulted from inattention caused by his depression, for which he is undergoing a course of treatment, which had been so successful that he could return to work from stress leave. *See Sublette*, 68 M.S.P.R. at 87. Under these circumstances, we find that his potential for rehabilitation is good. Balancing the *Douglas* factors, we find that a reasonable penalty for the sustained misconduct is a 30-day suspension.

ORDER

We ORDER the agency to cancel the appellant's removal and to substitute a 30-day suspension. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims

and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.

CONCURRING AND DISSENTING OPINION OF VICE CHAIR BETH S. SLAVET

in

John J. Caronia v. Department of Justice
Docket No. DA-0752-96-0428-I-1

I agree with the majority that the agency did not prove that it would have removed the appellant based on the sustained charge in the absence of the impermissible motivating factor - discrimination on the basis of disability. I dissent because, in my view, the majority's imposition of a 30-day suspension in this case is inconsistent with that finding, contrary to established law, and exceeds the Board's authority.

The administrative Judge sustained one of the two charges brought against the appellant, but found that the appellant had proved discrimination based on the agency's perception that he was disabled. The administrative judge reversed the removal action, finding that although the agency proved that the appellant brought an unauthorized firearm and ammunition upon the grounds of the facility, its primary reason for removing the appellant was because of his perceived disability. He further found that the agency engaged in a deliberate, intentional, and unlawful act of discrimination against the appellant in effecting his removal. ID at 12. His findings are supported by the record. Although the deciding official regarded the weapons infraction as serious, he testified that he formulated his decision to remove the appellant based on his concern over the appellant's statement to a co-worker that he had been in therapy for homicidal ideation. *See* Tr. at 43, 44-46. He also testified that he regarded the appellant's potential for rehabilitation as "nil." Tr. at 50. Therefore, as the majority finds, the record clearly supports the administrative judge's finding that the removal decision of the deciding official was primarily based on his perception that the appellant was disabled. *See* Majority op. at 8-10. Indeed, the majority finds that the agency failed to show that it would have

taken the same action, removal, based on the sustained charge, in the absence of the impermissible motivating factor of discrimination on the basis of disability. ("We find that the agency did not prove that it would have taken the same action, removal, based on the sustained charge in the absence of the impermissible motivating factor, discrimination on the basis of disability.") Majority op. at 15

Where a finding of direct discrimination has been made, in order to avoid a make whole order, the agency's burden is to demonstrate that it had a legitimate motive for its action that "standing alone, would have induced it to make the same decision." *Johnson v. Defense Logistics Agency,* 61 M.S.P.R. 601, 605 (1994) quoting *Price Waterhouse v. Hopkins* 490 U.S. 228, 252, 109 S. Ct. 1775, 1791 (1989)(emphasis added). To put it another way, for a remedy other than reinstatement to be appropriate, the agency must show that it would have taken the same disciplinary action absent consideration of the discriminatory motive. *Id.* at 610 and cases cited therein. *See George v. U.S. Postal Service,* 74 M.S.P.R. 71, 79, 80 (1997), citing to *Beam v. Office of Personnel Management,* 66 M.S.P.R. 469, 475 n. 1 (1995), where the Board noted that section 2000e-2(m) was added to Title VII of the Civil Rights Act to replace the former "mixed motive" framework for analyzing "direct" evidence discrimination claims set forth in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). The amendment at 42 U.S.C. § 2000-2(m) modified the rule of *Price Waterhouse* to hold the employer "liable once the plaintiff shows that a protected characteristic played a motivating part in the employment decision (the employer's proof that the same employment decision would have been made in the absence of the impermissible motive goes only to the issue of relief.) *See* 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B)(i)." *Lam v. University of Hawaii,* 40 F.3d 1551, 1564 n. 24 (9th Cir. 1994). Because the agency failed to prove that it would have taken the same action against the appellant had it not perceived him to be disabled, there is no basis for applying 42 U.S.C. § 2000e-5(g)(2)(B). *See Doane v. City of Omaha,* 115 F.3d 624, 629 (8th Cir. 1997). Title VII burdens of proof are applied to cases involving disability discrimination. *See Kutyna v. National Aeronautics & Space Administration,* EEOC Appeal No. 01944637, slip

op. at 3 and cases cited therein, (Dec. 4, 1995). In addition, the majority correctly states that under the Rehabilitation Act, the remedies available to an employee who proves discrimination because of his disability are defined by Title VII of the Civil Rights Act of 1964. *See* 29 U.S.C. § 794a.

Despite finding Title VII discrimination, and further finding that the agency failed to prove that it would have removed the appellant in the absence of the impermissible discriminatory motive so as to preclude it from claiming the limitations on relief provided by 42 U.S.C. § 2000e-5(g)(2)(B), the majority ignores those provisions. ("We find, however, that although a finding that the agency would have taken the same action in the absence of the impermissible factor would have disallowed an award of damages, reinstatement, or back pay, the contrary finding does not require the opposite result. Rather, as explained more fully below, the contrary finding merely allows the award of damages, reinstatement, and back pay, if those remedies are appropriate under all the circumstances of the case.") *Id.* at 15. The majority concludes that the Board has authority under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (CSRA), to determine whether, when not all of the charges are sustained, the penalty for the remaining sustained charge is reasonable. *See* Majority Opinion at p. 15-17. It further concludes that, in this instance, Title VII does not conflict with the Board's authority under the Civil Service Reform Act to review the agency's action under *White v. U.S. Postal Service,* 71 M.S.P.R. *521 (1996)* to determine whether the penalty was reasonable and to substitute the Board's choice of penalty. *See* Majority op. at 16-17. As stated above, under well-established law, the imposed penalty here must fail and the majority's approach must be rejected. Where there has been a finding that discrimination motivated the agency's action,the law simply does not permit the Board to impose a different penalty. In *White, supra,* the Board determined that it would not defer to an agency determination that was made on the basis of charges that were not sustained. However, in cases where discrimination has been established and where, as here, the record does not establish that the agency would have taken the action in the

absence of the discrimination, it is clear that there is no valid agency penalty and the Board has no authority to ignore Congress' mandated procedures and to substitute its judgment as to what the agency penalty should have been. This is a Title VII case and the Board's authority to consider whether a penalty is reasonable for the sustained charges, when not all the charges are sustained, does not permit the Board to ignore the express language of Title VII or governing law interpreting such language.

In view of the foregoing, the Board's *sua sponte* determination of whether the agency should have imposed a penalty short of removal, and the Board's imposition of its own substituted penalty, is clearly erroneous. See *Sublelle v. Dept. of the Army*, 68 M.S.P.R. 82, 86 (1995) (after a finding of agency discrimination, mitigation of penalty improper, as the remedy for discrimination is to make the victim "whole," citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975).[1] I recognize that the sustained charge here was serious in that it involved bringing an authorized firearm onto the grounds of a correctional facility. Indeed, I believe that had the agency established that absent its discrimination [2] it would have removed the appellant based only upon the remaining sustained relevant charge, then the Board could review the penalty under *White, supra*. However, as previously demonstrated, the record clearly establishes, and the Board majority sustains, the administrative Judge's finding that

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[1] Contrary to the implication by the majority, *Sublette* did not state that where the action was based solely on an impermissible motive, the remedy for the discrimination is to make the appellant whole. In fact, in *Sublette,* the Board concurred with the administrative judge's finding that the agency had proved its charge, but then specifically found that the AJ had erred in mitigating the penalty after finding discrimination. Although the Board itself then mitigated the penalty, it did so only after finding that the appellant failed to establish a prima facie case of disability discrimination. *Sublette* at 89. Here, the majority sustains the administrative judge's determination of disability discrimination.

[2] Under EEOC Enforcement Guidance on Psychiatric Disabilities and the American with Disabilities Act, an agency may discipline an individual with a disability (or perceived disability) for violating a workplace conduct standard if the misconduct resulted from a disability (see example 30).

the appellant proved disability discrimination and that the agency failed to prove that it would have taken the same action absent its impermissible motivating discrimination. Majority op. at 4 and 15. The majority's attempt to substitute a penalty it would have found appropriate absent the taint of discrimination, circumvents well established precedent. I respectfully dissent.

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Date

Beth S. Slavet, Vice Chair